

**NO. 02-18-00138-CR**

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**IN THE COURT OF APPEALS  
FOR THE SECOND DISTRICT OF TEXAS  
AT FORT WORTH**

FILED IN  
2<sup>nd</sup> COURT OF APPEALS  
FORT WORTH, TEXAS

8/5/2020 8:27:53 PM

**DEBRA SPISAK**  
Clerk

**CRYSTAL MASON,**

**Appellant,**

**V.**

**STATE OF TEXAS,**

**Appellee.**

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**On appeal from 432<sup>nd</sup> District Court  
Of Tarrant County, Texas  
In Cause No. 148710D  
The Honorable Ruben Gonzalez, Jr. Presiding**

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**APPELLANT'S REPLY IN SUPPORT OF MOTION FOR EN BANC  
RECONSIDERATION**

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## REASONS FOR RECONSIDERATION

The panel's Opinion holds that **“the fact that [Ms. Mason] did not know she was legally ineligible to vote was irrelevant to her prosecution”** for submitting a provisional ballot that was rejected. Op.17. This is legally untenable and carries extreme implications, threatening prosecution for tens of thousands of Texas voters who submit provisional ballots believing in good faith that they are eligible to vote but are incorrect in their belief, including individuals who registered to vote after cut-off, moved counties but did not know they needed to re-register, or mistakenly went to the wrong polling place.

The Opinion's jurisprudential errors and its far-reaching consequences result in an “extraordinary circumstance” that necessitates en banc reconsideration. Tex. R. App. P. 41.2(c).

**First**, the State cannot defend the Opinion's error in holding that an individual need not subjectively know that they were ineligible to vote, contrary to the plain language of the statute, which requires that **“the person knows the person is not eligible to vote.”** Tex. Elec. Code, §64.012.

*Delay v. State*'s controlling analysis confirms the Opinion's error. 465 S.W.3d 232 (Tex. Crim. App. 2014). The State parrots the Opinion's assertion that *Delay* is inapposite because there it was ambiguous whether the pertinent Election Code statute required that the individual “know” they violated the Code, whereas

here the knowledge requirement is clear. But this is a distinction without a difference: once *Delay* determined that the knowledge requirement applied to violating the Election Code, the Court also analyzed what is required to demonstrate such knowledge. That part of the Opinion controls here.

*Delay* unequivocally holds that knowingly violating the Election Code means “that the actor be aware, **not just of the particular circumstances** that render his otherwise-innocuous conduct unlawful, **but also of the fact that undertaking the conduct under those circumstances in fact constitutes a ‘violation of’ the Election Code.**” *Id.* at 250.

The Opinion cannot be reconciled with *Delay* and must be reconsidered.

**Second**, the State’s key new concession—that the federal Help America Vote Act (HAVA) ensures that voters who believe they are eligible to vote may submit a provisional ballot, even if they turn out to be mistaken, Resp.17—demonstrates the need for reconsideration. Under the State’s (and Ms. Mason’s) view of HAVA, the Opinion’s interpretation of Section 64.012(a)(1) conflicts with and is therefore preempted by HAVA.

In an attempt to avoid this obvious conflict, the State asserts that the Opinion does not “contemplate[] criminal prosecution of individuals who are mistaken in good faith about their eligibility to vote.” Resp.18.

**The State is wrong.**

The Opinion explicitly holds that such individuals are subject to prosecution under Section 64.012(a)(1): “[T]he State does not have to prove that the defendant subjectively knew that voting with that condition made the defendant ineligible to vote under the law.” Op.13. The Opinion also holds that Ms. Mason’s lack of knowledge about her ineligibility “was irrelevant to her prosecution.” Op.17.

The State’s attempt to deny this obvious holding underscores its inability to defend the Opinion’s sweeping implications.

**Third**, the State fails to defend the Opinion’s holding that submitting a provisional ballot that is rejected constitutes “vot[ing] in an election” under Section 64.012(a)(1). The State does not deny that the Opinion did not acknowledge contrary uses of “vote” in the Election Code and dictionaries. It argues that these contrary uses do not require any particular interpretation, but has no answer for the fact that they demonstrate ambiguity in the statute. As the Opinion recognizes, such statutory ambiguity be resolved in favor of Ms. Mason. The Opinion errs by failing to do so. The State also does not deny the Opinion’s definition leads to illogical consequences, and cannot explain how this definition would not render the separate offense of “attempt[ing] to vote” mere surplusage.

**I. The Opinion erred in holding that Ms. Mason did not need to know that she was ineligible to vote.**

The Opinion erred by holding that, so long as Ms. Mason knew of the underlying circumstances that ultimately rendered her ineligible to vote (here, per the Opinion, her supervised release), it did not matter that she did not actually know that those circumstances made her ineligible.

The Opinion’s holding is contrary to Section 64.012(a)(1)’s plain language, which requires that “the person **knows** the person is not eligible to vote.” If there were any doubt about whether the statute means what it says, *Delay* resolved it and confirms the Opinion’s error.

**A. The Opinion conflicts with *Delay*.**

The State attempts to distinguish *Delay* in the same way the Opinion does—arguing that the ambiguity at issue in *Delay* concerning the placement of the term “knowing” before both the *actus-reas* verb and the clause describing the *actus reas* distinguishes it from Section 64.012(a)(1), which lacks such ambiguity. Resp.5-6.

The State ignores the Motion’s explanation of why the Opinion erred on this point. Mtn.4-8.

The statute at issue in *Delay* reads “[a] person may not knowingly make a political contribution in violation of this chapter.” Tex. Elec. Code §253.003(a).

*Delay* noted ambiguity about “whether the word ‘knowingly’ ... modified merely **the making of** a campaign contribution,” or whether it also modified the

phrase “**in violation of**” the Election Code,” *Delay*, 465 S.W.3d at 250, but determined that the statute required the person to know the contribution violated the Election Code, *id.* at 251.

*Delay*’s interpretation renders Section 253.003’s knowledge requirement fundamentally equivalent to Section 64.012(a)’s knowledge requirement. *Delay* interpreted Section 253.003 to require that a person may not knowingly make a campaign contribution **which that person knows is in violation of the Election Code**. *Id.* Section 64.012(a) makes it an offense to “vote[.]... in an election **in which the person knows the person is not eligible to vote.**”

Critically, *Delay* still had to determine what it means to “knowingly” violate the Election Code. *Delay*’s resolution of this question dictates the outcome here. *Delay* unequivocally held that a “knowing” violation of the Election Code requires knowledge of the underlying circumstances **and “that undertaking the conduct under those circumstances in fact constitutes a ‘violation of’ the Election Code.”** *Delay*, 465 S.W.3d at 250.

Under *Delay*’s controlling logic<sup>1</sup>, here, the State had to prove not only that Ms. Mason knew she was on supervised release, but also that she “actually realized” that being on supervised release “in fact” makes her ineligible to vote.

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<sup>1</sup> The State does not deny that if *Delay* is applicable it abrogates the century-old *Thompson v. State*, 9 S.W. 486 (Tex. Ct. App. 1888), and decisions from other courts of appeals. Mtn.8-9.

*Id.* at 250, 252. By affirming a conviction based on nothing more than Ms. Mason’s knowledge that she was on supervised release, the Opinion directly conflicts with *Delay* and is therefore erroneous.<sup>2</sup>

**B. The Opinion does not hold that Ms. Mason subjectively knew she was ineligible to vote.**

The State asserts, in the alternative, that Ms. Mason was subjectively aware of her ineligibility. Resp.8-9. But the Opinion does not so hold; in fact, it reaches the opposite conclusion: “[C]ontrary to Mason’s assertion, **the fact that she did not know she was legally ineligible to vote** was irrelevant to her prosecution under Section 64.012(a)(1).” Op.17; Op.36-37 (“[T]he evidence does not show that she voted for any fraudulent purpose.”); Op.37 (“Mason may not have known with certainty that being on supervised release as part of her federal conviction made her ineligible to vote under Texas law....”).<sup>3</sup> Thus, the State’s assertion, contradicted by the Opinion, does not provide an alternative justification to affirm the conviction.

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<sup>2</sup> The State similarly argues that *State v. Edmond*, 933 S.W.2d 120 (Tex. Crim. App. 1996), *Ross v. State*, 543 S.W.3d 227 (Tex. Crim. App. 2018), and *Rehaif v. United States*, 139 S. Ct. 2191 (2019), are inapposite because they involved grammatical ambiguity about the knowledge requirement. Resp.6-7. But, after resolving that ambiguity to require the defendant to know that their actions were impermissible, none of those cases hold that the individual is charged with knowledge of the law; instead, they require that the individual **actually know** their actions were unlawful. *See* Mtn.9-10.

<sup>3</sup> Even if the Court determines that the Opinion does not reach the issue of Ms. Mason’s subjective knowledge, it would still need to re-examine the legal sufficiency of the evidence on that issue, which Ms. Mason has briefed on Opening and Reply and incorporates here.

## II. HAVA preempts the Opinion's interpretation of Section 64.012(a)(1).

The State does not dispute that, under the Elections Clause, HAVA preempts contrary state law. Mtn.16-17. It also concedes that HAVA “ensures that anyone who *believes they are eligible* to vote is given a provisional ballot if their name does not appear on the list of qualified voters.” Resp.17 (emphasis in the original).

Unable to defend the Opinion's extreme implications and clear contradiction with HAVA, the State instead claims that the Opinion does not “contemplate[] criminal prosecution of individuals who are mistaken in good faith about their eligibility to vote.” Resp.18.

This is a colossal mischaracterization of the Opinion, which squarely holds that individuals may be prosecuted under Section 64.012(a)(1) even if they are mistaken in good faith about their eligibility. According to the Opinion, so long as an individual is aware of the underlying condition, “**the State does not have to prove that the defendant subjectively knew that voting with that condition made the defendant ineligible to vote.**” Op.13-14; Op.34 (Section 64.012(a)(1) “allow[s] a person to be criminally prosecuted for voting illegally **when that person does not subjectively know that doing so violates the law**”). With respect to Ms. Mason, the Opinion concludes that “the fact that [Ms. Mason] did not know she was legally ineligible to vote was **irrelevant to her prosecution**” for submitting a provisional ballot that was rejected. Op.17. And, with regard to

federal preemption, the Opinion states that Congress did not intend through HAVA “to preempt state laws that allow illegal-voting prosecutions of persons who are ineligible under state law[.]” Op.44.

The Opinion’s holding threatens tens of thousands of Texans with potential prosecution. Mtn.19. This includes individuals who submitted provisional ballots because they had registered to vote after cut-off, moved counties but did not know they needed to re-register, or mistakenly went to the wrong polling place. Mtn.19-20. According to the Opinion, as long as these individuals were aware of the underlying circumstance that render them ineligible—the date on which they registered, that they moved counties, or their home address—they can be prosecuted for a second degree felony, even if they did not know that such circumstances rendered them ineligible.

**III. The Opinion erred in holding that submitting a provisional ballot that is rejected constitutes “vot[ing]... in an election.”**

**A. The Opinion failed to acknowledge ambiguity that must be resolved in favor of Ms. Mason.**

Contrary to the State’s argument, Ms. Mason does not contend that the Opinion erred by examining dictionary definitions to determine the meaning of “vote.” Resp.10-11. However, the Opinion erred when it undisputedly failed to acknowledge contrary dictionary definitions and uses in the Election Code, which demonstrate ambiguity about whether submitting a provisional ballot that is

rejected constitutes “vot[ing] in an election.” Mtn.12 (noting Election Code uses of the term “vote” that could mean only counted ballots, *e.g.*, Tex. Elec. Code §2.001 (“To be elected to a public office, a candidate must receive more votes than any other candidate.”); Mtn.13 (noting contrary dictionary definitions, including those that define “vote” as “exercis[ing] a political franchise” or “suffrage”); *see also* Mtn.12 (noting Election Code uses the verb “cast” to discuss provisional ballots<sup>4</sup>, *e.g.* Tex. Elec. Code §63.011 (establishing requirements for when a person “may cast a provisional ballot”))).

The State argues that these contrary uses **do not require** that Section 64.014(a)(1)’s use of the term “votes” exclude submitting an uncounted provisional ballot. Resp.12-13. But the State does not contest that these contrary uses and definitions undoubtedly demonstrate that “the statutory language **may be** understood by reasonably well-informed persons in two or more different senses.” *Price v. State*, 434 S.W.3d 601, 605 (Tex. Crim. App. 2014), which is sufficient to demonstrate statutory ambiguity. Under the Rule of Lenity, ambiguities must be resolved in favor of Ms. Mason. Op.11. The failure to do so was erroneous.

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<sup>4</sup> The State notes that HAVA uses the verb “vote” when discussing provisional ballots. Resp.12. The Election Code’s choice of a different verb, “cast,” underscores that the Election Code uses these terms distinctly. At most, HAVA’s usage would indicate ambiguity.

**B. The Opinion’s definition of voting leads to illogical consequences.**

The State does not address the fact that the Opinion’s definition leads to illogical consequences. Mtn.14-15. Pursuant to the Opinion, “to vote—can be broadly defined as expressing one’s choice, regardless of whether the vote actually is counted,” Op.27. Under this definition, all sorts of actions would constitute “voting” subject to criminal penalty, including if an individual handed their ballot to the election judge who deposited it in a receptacle marked “rejected ballots.” Mtn.14-15.<sup>5</sup>

Instead of defending the Opinion, the State argues that Ms. Mason’s interpretation of “vote” is also illogical because it would allow someone who subjectively knew they were ineligible to vote to submit a provisional ballot without criminal consequence. Resp.13-14. But, as established above, the Opinion subjects to prosecution individuals who **do not** subjectively know they are ineligible to vote. Moreover, it is entirely logical for the legislature not to criminalize good faith submissions of provisional ballots that are rejected, and there is nothing incongruous about requiring individuals who submit provisional ballots to attest to their eligibility but not criminalizing rejected provisional ballots under Section 64.012(a)(1).

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<sup>5</sup> The State concedes that Ms. Mason’s ballot was separated from others and placed in a “special bag.” Resp.15. It was then rejected.

**C. The Opinion renders superfluous Section 64.012's "attempt to vote" language.**

The Opinion's definition of "vote" impermissibly renders superfluous the separate crime of "attempt to vote." Mtn.15. Because, under the Opinion, any expression of choice would constitute a vote, no matter how that choice was disposed of, there would be no distinction between an attempted vote and a vote.

The State fails to identify any example of an "attempt to vote" that would not be swallowed by the Opinion's definition of "vote."

Instead, the State asserts (incorrectly) that Ms. Mason failed to provide authority to suggest that to constitute a vote, a ballot must be tallied. Resp.15. The Motion identified numerous Election Code statutes that do exactly that. Mtn.12-13.

Respectfully submitted,

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### **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 9.4(i)(3), the undersigned counsel certifies that the total number of words in Appellant's Reply In Support of Motion for En Banc Reconsideration, exclusive of the matters designated for omission, is 2,400 words as counted by Microsoft Word Software.

/s/ Thomas Buser-Clancy  
Thomas Buser-Clancy

### **CERTIFICATE OF SERVICE**

In accordance with the Texas Rules of Appellate Procedure, I hereby certify that a true and correct copy of this Motion has been served on counsel of record via e-service on August 5, 2020.

/s/ Thomas Buser-Clancy  
Thomas Buser-Clancy